

In addition to the transcripts listed in the Award, the Appeals Board also considered the Regular Hearing Transcript dated December 6, 1995. The parties' stipulations are listed in the Award.

ISSUES

The Administrative Law Judge found that claimant had a 90.5 percent work disability from April 1, 1995 through November 1, 1995 and a 61.5 work disability commencing November 2, 1995. The respondent and its insurance carrier asked the Appeals Board to review the issue of nature and extent of disability. Included in that issue is the question of claimant's average weekly wage on the date of accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds:

The Award entered by the Administrative Law Judge should be affirmed in part and modified in part to correct the mathematical computation of the benefits awarded.

The Appeals Board adopts the findings, analysis and conclusions of the Administrative Law Judge regarding claimant's permanent partial general disability. The Appeals Board affirms the Administrative Law Judge's finding that claimant has sustained a 90.5 percent permanent partial general disability for the period for April 1, 1995 through November 1, 1995 and a 61.5 percent disability commencing November 2, 1995.

At oral argument the respondent, for the first time, raised K.S.A. 44-501(c) as a defense and argued that claimant should be limited to medical compensation only because he was not disabled from earning full wages for at least one week. Because that issue was not raised before the Administrative Law Judge, the Appeals Board will not consider it on appeal. K.S.A. 1995 Supp. 44-555c limits Appeals Board review to the questions of law and fact presented to the administrative law judge.

The respondent also argued that claimant sustained a subsequent injury after being terminated by the respondent which accounts for his present disability. The Appeals Board finds that the evidence does not support respondent's allegation.

Claimant's average weekly wage becomes an issue because the formula to determine permanent partial disability benefits requires the comparison of claimant's pre- and post-injury average weekly wage. See K.S.A. 44-510e. The parties stipulated that claimant's base wage on the date of accident was \$621.68. However, claimant was also paid an additional \$7 per hour because he furnished his own welding equipment.

Under the facts presented, the Appeals Board finds that the additional \$7 per hour is not included in claimant's average weekly wage. Therefore, the Administrative Law Judge's determination of permanent partial disability benefits based upon the stipulated base wage of \$621.68 is correct. As claimant testified, the additional money was paid for the use of his welding equipment. The record does not contain evidence to determine whether claimant received any economic benefit from the additional \$7 per hour or whether that money merely covered claimant's equipment and operation costs. See Ridgway v. Board of Ford County Comm'rs, 12 Kan. App. 2d 441, 748 P.2d 891 (1987), for the

proposition that average weekly wage includes allowances paid to workers to the extent it results in economic gain.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl dated February 8, 1996, is hereby affirmed in part and modified in part as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Chester B. Kemp, and against the respondent, Blackburn, Inc., and its insurance carrier, Hartford Accident & Indemnity, for an accidental injury which occurred January 3, 1995 and based upon an average weekly wage of \$621.68, for 30.71 weeks at the rate of \$319.00 per week or \$9,796.49, for a 90.5% permanent partial general disability followed by 224.52 weeks at the rate of \$319.00 per week or \$71,621.88, for a 61.5% permanent partial general body disability, making a total award of \$81,418.37.

As of June 29, 1996, there is due and owing claimant 77.57 weeks of permanent partial disability compensation at the rate of \$319.00 per week or \$24,744.83, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$56,673.54 is to be paid at the rate of \$319.00 per week for 177.66 weeks until fully paid or further order of the Director.

The other orders of the Administrative Law Judge are hereby adopted by the Appeals Board as if fully set forth herein to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of July 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John Nodgaard, Wichita, KS
John Badke, Wichita, KS

Shannon S. Krysl, Administrative Law Judge
Philip S. Harness, Director